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***STATEMENT OF
JIM MARSZALEK
DAV NATIONAL SERVICE DIRECTOR
BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES***

MAY 2, 2017

Mr. Chairman and Members of the Committee:

Thank you for inviting DAV (Disabled American Veterans) to testify on the new appeals modernization framework and specifically on new draft legislation to implement it. As you know, the appeals modernization framework was developed through a remarkable collaboration between the Veterans Benefits Administration (VBA), the Board of Veterans Appeals (Board) and a group of stakeholders who represent veterans, including DAV. Through further consultation and collaboration with this Committee and others in Congress, we now have a legislation that DAV strongly supports and we look forward to working with you to move this legislation through the House and Senate, and onto the President's desk so that he can sign it into law.

As National Service Director for DAV, I want to thank you Mr. Chairman, Ranking Member Walz, as well as Chairman Bost, and Ranking Member Esty from the Subcommittee on Disability and Memorial Affairs for making appeals modernization a priority for the new 115th Congress. I also want to thank Congresswoman Titus for her leadership on this issue. As you may know, DAV is a congressionally chartered national veterans' service organization of 1.3 million wartime veterans, all of whom were injured or made ill while serving on behalf of this nation. To fulfill our service mission to America's injured and ill veterans and the families who care for them, DAV directly employs a corps of more than 260 National Service Officers (NSOs), all of whom are themselves wartime service-connected disabled veterans, at every VA regional office (VARO) as well as other VA facilities throughout the nation. Together with our Chapter, Department, Transition and County Veteran Service Officers, DAV has over 4,000 accredited representatives on the front lines providing free claims and appeals services to our nation's veterans, their families and survivors.

In 2016, DAV NSOs interviewed over 152,000 veterans and their families; filed over 197,000 new claims for benefits; and obtained more than \$4 billion in new and retroactive benefits for the injured and ill veterans we represented before the VA. We currently represent over one million veterans or survivors, making DAV the largest veterans service organization providing claims assistance. In addition DAV employs 11 National Appeals Officers (NAO) who represent veterans, dependents and survivors in their appeals before the Board of Veterans'

Appeals (Board). In fiscal year 2016, DAV NAOs provided representation for 28 percent of all appeals decided by the Board, a caseload of 14,630 appeals, more than any other VSO. This testimony reflects the collective experience and expertise of our thousands of dedicated and highly trained service officers who provide free claims and appeals assistance to hundreds of thousands of veterans and survivors each year.

While the claims and appeals process has always taken too long to get veterans accurate decisions, over the past few years the number of pending appeals has risen dramatically – to over 450,000 – even while the claims backlog has been significantly reduced. As a result, an appeal today can take anywhere from three to five years before final resolution, a delay that is simply unacceptable and often harmful for veterans forced to wait years for earned benefits. We hope today's hearing will move us one step closer to finally enacting meaningful reform of the appeals process.

Mr. Chairman, the draft bill you have put forward builds upon the efforts of the workgroup comprised of VBA, the Board and 11 major stakeholder organizations, including DAV, all of whom assist veterans with their appeals. Just over one year ago, over several very intensive months that included a number of closed-door, all-day sessions, the workgroup was able to reach general consensus on principles, provisions and ultimately draft legislation. Several bills embodying the framework were introduced last year in the House and Senate, and one subsequently passed the House, however further action stalled as the 114th Congress came to a close. However, we were very pleased that legislation embodying the appeals modernization framework was reintroduced in the House (H.R. 457) by Rep. Dina Titus, and in the Senate (S. 712) by Sen. Blumenthal, in addition to the draft legislation being considered by the Committee today. We are greatly encouraged with the bipartisan support for reforming the appeals system and look forward to working with all of you to continue refining the legislation while moving swiftly to enact it early this year.

Before turning to the draft legislation, it is important to understand that the pending and growing appeals inventory was primarily an unfortunate, yet foreseeable consequence of a long-term lack of adequate resources for both VBA and the Board. Over the past five years, there was a clear shift of focus and resources inside VBA to bringing down the claims backlog, thereby neglecting the appeals processing at VA Regional Offices (VARO) and resulting in today's staggering appeals backlog. Moving forward, adequate resources will be critical to the success of appeals reforms, as well as continuing progress on the claims backlog.

A New Framework for Veterans' Claims and Appeals

The new framework developed by the workgroup would protect the due process rights of veterans while creating multiple options for them to receive their decisions in a more judicious manner. The critical core of the new system allows veterans to have multiple options to reconcile unfavorable claims' decisions, introduce new evidence at both the Board and VBA, and protect their earliest effective dates without having to be locked into the current long and arduous formal appeals process at the Board.

In general, the framework embodied in the draft legislation would have three main options for veterans who are unsatisfied with their claims decision. Veterans must elect one of these three options within one year of the claims decision to protect their effective date. First, there will be an option for a local, higher-level review of the original claim decision based on the evidence of record at the time of the claim decision. Second, there will be an option for readjudication and supplemental claims when new and relevant evidence is presented or a hearing requested. Third, there will be an option to pursue an appeal to the Board – with or without new evidence or a hearing.

The central dynamic of this new system is that a veteran who receives an unfavorable decision from one of these three main options may then pursue one of the other two appeals options. As long as the veteran continuously pursues a new appeals option within one year of the last decision, they would be able to preserve their earliest effective date, if the facts so warrant. Each of these options, or “lanes” as some call them, have different advantages that allow veterans to elect what they and their representatives believe will provide the quickest and most accurate decision.

For the higher-level review option, the veteran could choose to have the review done at the same local VARO that made the claim decision, or at another VARO, which would be facilitated by VBA’s electronic claims files and the National Work Queue’s ability to instantly distribute work to any VARO. The veteran would not have the option to introduce any new evidence, nor have a hearing with the higher-level reviewer, although VBA has indicated it may allow veterans’ representatives to have informal conferences with the reviewer in order for them to point out errors of fact or law. The review and decision would be “de novo” and a simple “difference of opinion” by the higher-level reviewer would be enough to overturn the decision in question. If the veteran was not satisfied with the new decision, they could then elect one of the other two options.

For this higher-level review, the “Duty to Assist” (DTA) would not apply since it is limited to the evidence of record used to make the original claims decision. If a “duty to assist” error is discovered that occurred prior to the original decision, unless the claim can be granted in full, the claim would be sent back to the VARO to correct any errors and readjudicate the claim. If the veteran was not satisfied with that new decision, they would still elect the other appeal options. It is critical that relevant information be captured relative to decisions that have been overturned by a higher-level reviewer, the number of decisions upheld, and the number of decisions sent back to the RO’s to correct DTA violations. This information is needed to correct any claims processing errors that may be taking place within RO’s.

For the readjudication/supplemental claims option, veterans would be able to request a hearing and present new evidence that would be considered in the first instance at the VARO. VA’s full “duty to assist” would apply during readjudication, to include development of both public and private evidence. The readjudication would be a de novo review of all the evidence presented both prior to and subsequent to the claims decisions until the readjudication decision was issued. As with a higher-level review, if the veteran was not satisfied with the new decision, they could then elect one of the other two options to continue redress of the contested issue(s). These first two options take place inside VAROs and cover much of the work that is done in the

current Decision Review Officer (DRO) process, although it would be separated into two different lanes: one with and one without new evidence or hearings.

For the third option, a notice of disagreement would be filed to initiate Board review, triggering the formal appeal process. The Board would operate two separate dockets, one that does not allow hearings and new evidence to be introduced; and a second that allows both new evidence and hearings. The Board would have no “duty to assist” obligation to develop any evidence presented. For both of these dockets, the appeal would be routed directly to the Board and there would no longer be Statements of Case (SOCs), Supplemental Statement of the Case (SSOCs) or any VA Form 8 or 9 to be completed by VBA or the veteran. The workgroup established a goal of having no hearing/no evidence appeals resolved within one year, but there was no similar goal for the more traditional appeals docket. While eliminating introduction of evidence and hearings would naturally make the Board’s review quicker, it is important that sufficient resources be allocated to the traditional appeal lane at the Board to ensure a sense of equity between both dockets.

For the Board docket that allows hearings, veterans could choose either a video conference hearing or an in-person hearing at the Board’s Washington, DC offices; there would no longer be travel hearing options offered to veterans. New evidence would be allowed, but limited to specific timeframes: if a hearing is elected, new evidence could be presented at the hearing or for 90 days following the hearing; if no hearing is elected, new evidence could be presented with the filing of the NOD or for 90 days thereafter. If the veteran was not satisfied with the Board’s decision, they could elect one of the other two VBA options, and if filed within one year of the Board’s decision, they would continue to preserve their earliest effective date. The new framework would impose no limits on the number of times a veteran could choose one of these three options, and as long as they properly elected a new one within a year of the prior decision, they would continue to protect their earliest effective date.

If the Board discovers that a “duty to assist” error was made prior to the original claims decision, unless the claim can be granted in full, the Board would remand the case back to VBA for them to correct the errors and readjudicate the claim. Again, if the veteran was not satisfied with the new claim decision, they could choose from one of the three appeals options available to them, and as long as they properly made that NOD election within one year of the decision, they would continue to preserve their earliest effective date.

Improving Claims Decision Notification

While the workgroup was initially focused on ways to improve the Board’s ability and capacity to process appeals, from the outset we realized that appeals reforms could not be fully successful unless we simultaneously looked at improving the front end of the process, beginning with claims’ decisions. One of the issues that the development of the FDA proposal exposed was the importance of strengthening decision notification letters provided by VBA. A clear and complete explanation of why a claim was denied is the key to veterans making sound choices about if and how to appeal an adverse decision. Therefore, a fundamental feature of the new appeals process must include ensuring that claims’ decision notification letters are adequate to properly inform the veteran.

Under the new framework, the contents of the notification letter must be clear, easy to understand and easy to navigate. The notice must convey not only VA's rationale for reaching its determination, but also the options available to claimants after receipt of the decision. The draft legislation would require that in addition to an explanation for how the veteran can have the decision reviewed or appealed, all decision notification letters must contain the following information to help them in determining whether, when, where and how to appeal an adverse decision:

- (1) A list of the issues adjudicated;
- (2) A summary of the evidence considered;
- (3) A summary of applicable laws and regulations;
- (4) Identification of findings favorable to the claimant;
- (5) Identification of elements that were not satisfied leading to the denial;
- (6) An explanation of how to obtain or access evidence used in making the decision; and
- (7) If applicable, identification of the criteria that must be satisfied to grant service connection or the next higher level of compensation for the benefit sought.

Overall, the new framework embodied in the draft legislation would provide veterans with multiple options and paths to resolve their disagreements more quickly, while preserving their earliest effective dates to receive their full entitlement to benefits. The structure would allow veterans quicker "closed record" reviews at both VBA and the Board, but if they believe that additional evidence is needed to satisfy their claim, they retain the right to introduce new evidence, or request a hearing at either VBA or the Board. If implemented and administered as envisioned by the workgroup, this new appeals system could be more flexible and responsive to the unique circumstances of each veteran's claim and appeal, leading to better outcomes for many veterans.

Significant Modifications to Appeals Framework in Draft Legislation

Although this draft bill embodies the appeals modernization framework agreed to by the workgroup last year, it includes some significant differences.

This legislation would enhance effective date protections for claimants that choose to file appeals with the Court of Appeals for Veterans Claims, the Court of Appeals for the Federal Circuit and the Supreme Court. Claimants could preserve their effective dates for continuously pursued claims, if they choose to file a supplemental claim within one year following a decision from these courts. This is a fair and equitable approach to provide claimants with the option to exercise their full appellate rights, without having to potentially jeopardize their effective date.

Under this proposal, claimants with legacy appeals would also be permitted to enter into the new system at certain junctures. In instances when a Statement of the Case, or Supplemental Statement of the Case is issued, claimants would have the opportunity to opt into the new processing system. In addition, this draft legislation would allow veterans who file a Notice of Disagreement within one year of the new system becoming effective, the option to enter into the new system rather than being forced to undergo processing in the legacy system. These changes

were proposed by VBA and the Board and DAV supports them. Allowing claimants to make well informed decisions on the type of processing that is in their best interest would not only help to reduce the number of legacy claims, but provide these claimants with options best suited for their individual circumstances.

In order to provide greater assurance that VBA and the Board are prepared to make this major transition to a new appeals system, the legislation would require the Secretary to submit a detailed transition and implementation plan, and then require the Secretary to certify that all elements are in place to efficiently process legacy claims and run the new modernized system. Furthermore, VSO collaboration is required along with this certification, a provision that serves everyone's best interests. DAV looks forward to continuing to work with VBA, the Board and Congress to ensure the transition and implementation is as smooth as possible.

Lastly, the draft legislation contains detailed reporting requirements, along with oversight to be performed by the Government Accountability Office (GAO). It is essential to have continuous real-time data concerning elements of both the legacy system and modernized system. In order to measure VA's progress, these metrics will assess where modifications would be needed in order to improve processing within either system. The oversight performed by GAO is another effective way of ensuring these changes produce a positive outcome for claimants within the legacy and modernized systems.

RECOMMENDATIONS

Options Following decision by the Agency of Original Jurisdiction

Section 2 (h) (1) (a), of this bill sets forth the options available to a claimant once a decision has been made. These options include, but are not limited to, filing a supplemental claim, requesting a higher level review, or filing a notice of disagreement.

Within this provision, there is some uncertainty how the word "claim" would be interpreted. Today, one claim can contain multiple issues, or a claim can simply contain one issue. The language would need to specify that a claimant can seek one of the three options noted above separately for each "issue" contained within a claim in order to avoid any unintended consequences that would disadvantage a claimant. For example, a veteran seeking an increased rating for hearing loss should be able to choose to file a supplemental claim for that issue, while also filing their notice of disagreement to the Board for the denial of service connection for a left knee disability. Allowing each issue to flow through the most appropriate "lane" will not only result in more timely decisions for the veteran, it will also make more efficient use of both VBA and Board resources.

DAV recommends:

- The legislation clarify that claimants can elect different appeals options for individual "issues" decided within a claim.

Appeals to the Board

The manner in which evidence would be handled by the Board, particularly, as it pertains to their DTA requirements would fundamentally change under this proposal.

The draft legislation would create two separate dockets for the Board, while allowing them the authority to create additional dockets. The first docket, currently called the “non-hearing” docket in the legislation, would be for claimants that simply want their case reviewed at the Board based on the evidence of record, the simplest docket to manage. The Board would be limited to determining if the decision can be overturned based on the evidence of record, or whether VBA committed any DTA violations during the adjudication of a claim.

The second docket, currently called the “hearing” option docket in the legislation, would allow claimants the right to a hearing as well as to submit evidence directly to the Board for their review in the first instance. A claimant who chooses the “hearing” docket would then have to elect whether to request a “hearing” in the “hearing” docket, or to request “no hearing” in the “hearing” docket, which would still allow them the opportunity to submit evidence. For those who choose the “hearing” docket with the “hearing” option, they would have an opportunity to supply evidence at and up to 90 days after their Board hearing.

For those who choose the “hearing” docket with the “no hearing” option, they would have the opportunity to submit new evidence with and up to 90 days after filing their NOD. However, the legislation does not make clear whether evidence presented with the NOD or 90 days thereafter for the “hearing” docket / “hearing” option would be accepted, returned or ignored. Would the Board really ignore evidence that arrived one day prior to a hearing?

We believe legislative language in the draft bill used to distinguish the two dockets, compounded by the separate evidentiary time periods associated with each, could cause confusion, disadvantage some veterans and add unnecessary complexity to the Board’s processing of these appeals.

DAV recommends:

- New terminology should be used to distinguish the two dockets, such as the term “new evidence” rather than “hearing”. For example, there could be one docket for “no new evidence” and another for “new evidence.” The “new evidence” docket would then offer the option to request a hearing, because the hearing itself is also evidence.
- Rather than having two distinctly different time periods when evidence would be accepted for the “new evidence” docket, the “hearing” option should allow evidence to be presented from the filing of the NOD until 90 days after the hearing. Evidence presented prior to a hearing would simply be made part of the record and considered in conjunction with the appellate issues before the Board. Since the Board no longer would have any DTA obligations, all new evidence would still be considered at the same time after the hearing.

- The Board should be required to regularly report on the length of time it takes to process appeals on each docket, including separate metrics for those that request hearings and those who submit new evidence but don't request hearings.
- For evidence presented prior to the hearing date, where evidence can be supplied within 90 days following a hearing, we recommend this evidence simply be made part of the record.
- For evidence presented to the Board after the time periods allowed in the law on the "new evidence docket", or any evidence presented for appeals on the "no new evidence" docket, the decision notice explain the evidence was not considered in the decision, together with an explanation of options for the claimant to have such evidence considered. The draft legislation already contains a provision requiring this notice for the new "higher level review" option, which should be the same for Board decisions.

The legislation would also provide the Board with the authority to "screen cases" in order determine if further development is required earlier in the process, rather than waiting longer to accomplish the same thing.

To assure this authority is properly utilized, DAV recommends:

- The Board be required to report on all screened cases, delineated by:
 - The number of issues found to require additional development;
 - The types of issues that required additional development, i.e., issues involving service connection, or issues involving increased ratings;
 - The number of claimants that chose to opt into the new system following remand;
 - The number of claimants that chose to remain in the legacy system following remand;
 - The number and types issues that were granted based on screening;
 - The number of cases containing multiple decisions, including how many of the issues were remanded, denied, or allowed.

The draft legislation mandates the creation of the two dockets discussed above, and also provides authority for the Board to create additional dockets, subject to notifying the House and Senate Veterans' Affairs Committees, with the justification. The Board might consider creating a third docket in order to separate appeals that will include new evidence, but do not request a hearing. As it stands now, veterans who submit new evidence, but do not request a hearing could be forced to wait months, or even years behind veterans who request a hearing. A third docket could be implemented to avoid such unnecessary delays for veterans, allow greater oversight and make more efficient use of Board resources.

New and "Relevant" Evidence

The legislation would replace the standard for reopening claims from "new and material" with "new and relevant." In the current system, the "new and material" standard has not effectively functioned as intended to focus VBA and Board resources on adjudicating the substance of claims and appeals.

In order to monitor whether the “new and relevant” standard will be more effective in this regard, while continuing to protect veterans rights, DAV recommends::

- VBA and the Board should regularly report on the number and outcome of “new and relevant” decisions, including –
 - The number of supplemental claims denied because no “new and relevant” evidence had been received;
 - The number of higher level reviews filed with respect the issue of no “new and relevant” evidence, and the disposition of these higher level reviews;
 - The number of appeals filed with respect to the issue of no “new and relevant” evidence, which Board docket or options were used, and the outcome of the Boards determination, i.e, decisions upheld, decisions overturned, cases remanded for DTA violations.

Stakeholder Transition and Implementation Advisory Committee

Since March of 2016, DAV, Congress, VA, the Board and many other stakeholders have worked very closely to develop and refine the appeals modernization proposal. This partnership has been integral to making sure a modernized system will benefit our nation’s injured and ill veterans, without compromising their due process rights and keeping VA’s non-adversarial roll intact.

We are appreciative that the draft legislation includes a provision that requires the Secretary to collaborate and consult with the three largest veterans’ service organizations as part of the certification required to begin operating the new appeals system, and expect that our continued partnership with VA will continue to benefit both veterans and the VA. However, the hard work of implementing operating this new system will continue for many years, and VSOs and other stakeholders can continue to play an integral role supporting this effort.

To ensure this partnership continues on throughout all phases of the implementation process, DAV recommends:

- The legislation include a provision to create a “Stakeholder Transition and Implementation Advisory Committee” to engage with VBA and the Board during implementation, transition and operation of the new system. This advisory committee should be composed of at least the three largest VSO’s in terms of the number of claimants they represent before the VBA and the Board, as well as other major stakeholders who represent veterans at VBA of the Board, as determined by the Secretary.

Planning, Oversight and Public Reporting

The draft legislation includes a number of new planning, reporting and certification requirements that are appropriate for legislation embodying such a significant transformation. This level of reporting is critical to allow Congress and other stakeholders to help identify and offer solutions to unintended consequences and problems that may arise.

To strengthen this oversight, DAV recommends:

- The legislation require that all VA plans, metrics and reports provided to Congress also be made immediately available to the public.

Temporary Staffing Increases

Finally, as mentioned above, the most critical factor in the rise of the current backlog of pending appeals was the lack of sufficient resources to adequately manage the workload. Similarly, unless VBA and the Board request and are provided adequate resources to meet staffing, infrastructure and IT requirements, no new appeals reform will be successful in the long run. As VBA's productivity continues to increase, the volume of processed claims will also continue to rise, which has historically been steady at a rate of 10-11 percent of claims decisions. In addition, the new claims and appeals framework will likely increase the number of supplemental claims filed significantly.

We are encouraged that VA has indicated a need for greater resources for both VBA and the Board in order to make this new appeals system successful; however, too often in the past funding for new initiatives has waned over time. We would urge the Committee to ensure that proper funding levels are determined and appropriated as this legislation moves forward.

Over the past few years, DAV and our *Independent Budget* partners have recommended that Congress consider providing VBA with the temporary authority and resources to hire two-year temporary employees. In the past, VBA used such an authority to hire several thousand employees for a temporary two-year term. At the end of those two years, many of the best that were hired on a temporary basis transitioned into permanent positions as they became open due to attrition. VBA not only had additional surge resources to work on the claims backlog during the two-years, but VBA also benefited by creating a pool of trained, qualified candidates to choose from as replacements for full-time employees leaving VBA.

This draft bill recognizes the need to address personnel requirements within the VBA and the Board as they implement and administer the modernized appeals system, as well as address the legacy appeals.

In order to provide a surge capacity to address both appeals and claims, DAV recommends:

- VBA and the Board be provided additional authority and resources to hire two-year temporary employees, with the goal of eventually making the best of the temporary employees permanent employees based on the future and continuing personnel requirements of VBA and the Board.

Mr. Chairman, the draft legislation being considered today represents a true collaboration between VA, VSOs, other key stakeholders and Congress in order to reform and modernize the appeals process. We are confident that this draft legislation, with the additional improvements recommended by DAV and other, could provide veterans with quicker favorable outcomes, while fully protecting their due process rights.

We remain committed to working with you, VA and other stakeholders to resolve any remaining issues and swiftly pass and enact comprehensive appeals reform legislation early this year.

That concludes my testimony and I would be happy to answer any questions that you or members of the Committee may have. Thank you.

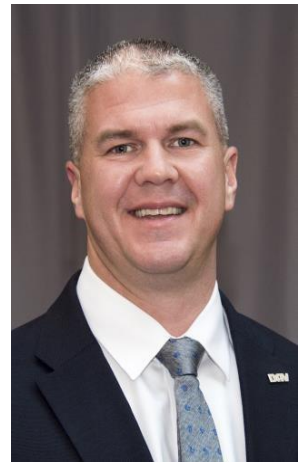


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Biographical **INFO**

JIM MARSZALEK

National Service Director
DAV (Disabled American Veterans)



Jim Marszalek, a U.S. Marine Corps veteran, was appointed National Service Director for the 1.3 million-member DAV in August 2013. He works at DAV's National Service & Legislative Headquarters in Washington, D.C.

Marszalek manages all activities of the DAV's National Service Program, which employs approximately 270 professional national service officers (NSOs), 33 transition service officers (TSOs) and support staff in 100 offices throughout the United States and in Puerto Rico. These service officers represent veterans and their families with claims for benefits from the Department of Veterans Affairs and the Department of Defense. DAV's direct hands-on services make up the largest item in the organization's budget for program services. During calendar year 2015, NSOs and TSOs, all wartime service-connected veterans, represented more than 300,000 claims for VA benefits for veterans and their families, obtaining more than \$4 billion in new and retroactive benefits for them.

Marszalek joined the DAV professional staff in 2001 as a member of Class IXI at the DAV National Service Officer Training Academy in Denver, Colorado.

Following graduation from the NSO Training Academy in 2001, Marszalek was assigned as an NSO apprentice at the DAV National Service Office in Cleveland, Ohio. He assumed supervisory roles across the country, and in 2012 was appointed as Deputy National Service Director, where he served until his current appointment.

A native of Pittsburgh, Pennsylvania, Marszalek entered the Marine Corps in 1996 and was honorably discharged in April 2000.

Marszalek is a life member of DAV Chapter 76, Pittsburgh, Pennsylvania. He resides with his wife, Jillian and two sons Ashton and Kingston in Huntingtown, Maryland.

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DISCLOSURE OF FEDERAL GRANTS OR CONTRACTS

The Disabled American Veterans (DAV) does not currently receive any money from any federal grant or contract.

During fiscal year (FY) 1995, DAV received \$55,252.56 from Court of Veterans Appeals appropriated funds provided to the Legal Service Corporation for services provided by DAV to the Veterans Consortium Pro Bono Program. In FY 1996, DAV received \$8,448.12 for services provided to the Consortium. Since June 1996, DAV has provided its services to the Consortium at no cost to the Consortium.